

Juanita Brooks (SBN 75934)
Dina Grinshpun (SBN 212625)
FISH & RICHARDSON P.C.
12390 El Camino Real
San Diego, California 92130-2081
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Karen I. Boyd (SBN 189808)
FISH & RICHARDSON P.C.
500 Arguello Street, Suite 500
Redwood City, CA 94063
Telephone: (650) 839-5070
Facsimile: (650) 839-5071

Attorneys for Plaintiffs
UNITHER PHARMA, INC. and
THE BOARD OF TRUSTEES OF THE
LELAND STANFORD JUNIOR UNIVERSITY.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITHER PHARMA, INC. and
THE BOARD OF TRUSTEES OF THE
LELAND STANFORD JUNIOR
UNIVERSITY

Plaintiffs

v.

HERBALIFE INTERNATIONAL, INC.

Defendant

C03 05090

**COMPLAINT FOR PATENT
INFRINGEMENT**

DEMAND FOR JURY TRIAL

Plaintiffs Unither Pharma, Inc. and the Board of Trustees of the Leland Stanford Junior
University hereby allege as follows:

THE PARTIES

1. Unither Pharma, Inc. ("Unither") is incorporated under the laws of the state of
Delaware, and has a regular and established place of business at 1110 Spring Street, Silver Spring,
Maryland 20910. Unither is the successor in interest of Cooke Pharma, Inc. ("Cooke Pharma"),
which was incorporated under the laws of the state of California and located at the same address as
Unither.

ORIGINAL
FILED

NOV 17 2003

RICHARD W. WILKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

JURISDICTION AND VENUE

6. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b), (c) and 1400 because Herbalife resides in this judicial district.

8. Stanford and Cooke Pharma entered into an agreement under which Stanford granted Cooke Pharma an exclusive license under the '006 patent for the use and sale of amino acid-based dietary supplements or pharmaceuticals to enhance the level of endogenous nitric oxide in the vascular system. Under the same agreement, Stanford provided Cooke Pharma with a right to institute actions and recover damages for infringement of the '006 patent and the right to join Stanford as a plaintiff in any such action. Unither is the successor in interest to all rights granted by Stanford to Cooke Pharma under the agreement.

10. Upon information and belief, Herbalife is now and has been infringing the '006 patent in this District and elsewhere by making, selling, and/or using products and methods covered

1 by one or more claims of the patents-in-suit, including products containing L-arginine (including, at
2 least, Niteworks™, Prelox™ Blue, Optimum Performance, and Woman's Advantage™ with
3 DHEA), or by supplying infringing products to others to use, thereby inducing infringement and/or
4 contributing to the infringement of the '006 patent.

5 **FIRST CAUSE OF ACTION**

6 **(INFRINGEMENT OF THE '006 PATENT)**

7 11. Each allegation contained in paragraphs 1-10 above is incorporated herein by
8 reference.

9 12. Herbalife is currently and has been infringing, inducing and/or contributing to the
10 infringement of the claims of the '006 patent by making, using, selling, offering to sell and/or
11 importing products containing L-arginine without the consent of Unither.

12 13. Herbalife will continue to infringe, induce and/or contribute to the infringement of
13 the claims of the '006 patent unless enjoined by this Court.

14 14. Herbalife has willfully and deliberately infringed, induced and/or contributed to the
15 infringement of the claims of the '006 patent with full knowledge and disregard of Plaintiffs' rights
16 thereunder, rendering this an "exceptional" case within the meaning of 35 U.S.C. § 285.

17 15. As a result of Herbalife's acts, Plaintiffs have suffered damages.

18 **SECOND CAUSE OF ACTION**

19 **(PROVISIONAL RIGHTS UNDER THE '006 PATENT)**

20 16. Each allegation contained in paragraphs 1-15 above is incorporated herein by
21 reference.

22 17. The United States Patent and Trademark Office published U.S. Patent Application
23 No. 10/060,252 ("the '252 application"), now the '006 patent, pursuant to 35 U.S.C. § 122(b), 37
24 C.F.R. § 1.211, et seq., on October 17, 2002, Publication No. US 2002/0151592 A2 (attached as
25 "Exhibit B").

26 18. The invention as claimed in the '006 patent is substantially identical to the invention
27 as claimed in the published '252 application.
28

19. Herbalife has had actual notice of the '252 application since at least July 25, 2003 (Letter to Herbalife attached as "Exhibit C").

20. Herbalife violated Plaintiffs' provisional rights under the '006 patent by making, using, selling, offering to sell and/or importing its products containing L-arginine without the consent of Unither.

21. As a result of Herbalife's acts, Plaintiffs have suffered damages and are entitled to a reasonable royalty.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

- a. That this Court adjudge and declare that Herbalife has infringed, induced and/or contributed to the infringement of the '006 patent;
- b. That this Court adjudge and declare that Herbalife has violated Plaintiffs' provisional rights under the '006 patent;
- c. That this Court preliminarily enjoin Herbalife, its officers, directors, employees, agents, licensees, servants, successors and assigns, and any and all persons acting in privity or in concert with them from infringing, actively inducing infringement or contributing to infringement of the '006 patent;
- d. That this Court permanently enjoin Herbalife, its officers, directors, employees, agents, licensees, servants, successors and assigns, and any and all persons acting in privity or in concert with them from infringing, actively inducing infringement and/or contributing to infringement of the '006 patent;
- e. That this Court award to Plaintiffs damages adequate to compensate them for Herbalife's acts of infringement, inducement of and/or contributions to infringement of the '006 patent, together with interest thereon;
- f. That this Court award to Plaintiffs reasonable royalties for Herbalife's violation of Plaintiffs' provisional rights under the '006 patent;
- g. That this Court award treble damages against Herbalife for its willful infringement, inducement of and/or contribution to infringement of the '006 patent;

- 1 h. That this Court order Herbalife to pay Plaintiffs their reasonable attorneys' fees for
2 this action;
- 3 i. That this Court order Herbalife to pay Plaintiffs any and all costs of this action; and,
- 4 j. That this Court grant to Plaintiffs such other and further relief as it may deem just
5 and equitable.

6

7 A JURY TRIAL IS DEMANDED BY PLAINTIFFS.

8

9 Dated: November 17, 2003

FISH & RICHARDSON P.C.

10

11 By: 

12 Karen I. Boyd

13 Attorney for Plaintiffs
14 UNITHER PHARMA, INC. and
15 THE BOARD OF TRUSTEES OF THE
16 LELAND STANFORD JUNIOR
17 UNIVERSITY.
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATION PURSUANT TO CIVIL L.R. 3-16

Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could be substantially affected by the outcome of this proceeding:

United Therapeutics Corporation, which is the parent of wholly owned subsidiary Unither Pharma, Inc., the plaintiff in this action.

Dated: November 17, 2003

FISH & RICHARDSON P.C.

By:


Karen I. Boyd

Attorney for Plaintiffs
UNITHER PHARMA, INC. and
THE BOARD OF TRUSTEES OF THE
LELAND STANFORD JUNIOR
UNIVERSITY.